In the
Supreme Court of the United States

IN THE MATTER OF

The application of Frank D. Winn, for a writ of mandamus against the Hon. Smith McPherson, District Judge of the United States, for the Southern District of Iowa, Central Division, and against the Circuit Court of the United States, for the Southern District of Iowa, Central Division.

To the Honorable Melville W. Fuller, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

BRIEF FOR PETITIONER

Mandamus does not lie to control judicial discretion, except when that discretion has been abused; but it is a remedy when the case is outside of the exercise of this discretion, and outside the jurisdiction of the court or officer to which or to whom the writ is addressed. One of its peculiar and more common uses is to restrian inferior courts, and to keep them within their lawful bounds.

(Virginia v. Rives (Ex Parte Virginia) 100 U. S. 316.)

Where a circuit court has no jurisdiction over a cause removed by defendant from a state court, and refuses to remand it upon proper motion, mandamus is plaintiff's remedy.

(*Ex parte Wisner*, 203 U. S. 449.)

The difference between the case at bar, and the case of *Ex parte*—In the matter of the State of Nebraska, 209 U.

S. 436, and *Re James Pollitz*, 206 U. S. 323, is, that in the latter cases the court was called upon to decide, in a judicial capacity and to use his discretion therein, a question outside the jurisdictional one, to wit, whether or not there was a separable controversy between citizens wholly of different states to the determination of which the state was or was not a necessary party. Had the matter to have been decided therein been upon the question of diverse citizenship, or whether or not the plaintiff's original petition presented a federal question, then there had not been such a discretion as to have defeated the issuance of the writ. In other words, the discretionary powers necessary to defeat the issuance of the writ of mandamus, must be such discretionary powers exercised in connection with matters outside the record.

(*Ex parte*:—In the matter of the State of Nebraska, 209 U. S. 436.)
(*Re James Pollitz*, 206 U. S. 323.)

Want of jurisdiction from any cause appearing on the face of the record, entitles plaintiff to a writ of mandamus where the Federal Court refuses to perform the duty to remand, as these cases are outside the discretion and jurisdiction of the court.

(*Virginia v. Paul*, 148 U. S. 107.)
(*Virginia v. Rives, supra.*)
(*Ex parte Wisner, supra.*)

Under Sections 1, 2, 3, of the Act of March 3, 1875 (18 Stat. at L. Chap. 137), as amended by the Act of March 3, 1887 (24 Stat. at L. 552, Chap. 373) corrected by the Act of August 13, 1888 (25 Stat. at L. 433, Chap. 866, U. S. Comp. Stat. 1901, p. 508) an action commenced in the state court, by a citizen of another state, against a non-resident defendant, who is a citizen of a state other than that of plain

tiff, cannot be removed by the defendant into the Circuit Court of the United States, on the ground of diverse citizenship, at least where the plaintiff resists the removal

(Ex parte Abraham C. Wisner, supra.)

A case cannot be removed to the Circuit Court of the United States from a State Court, on the ground that it arises under the Laws of the United States, unless that fact appears from the plaintiff's statement of his own claim; and if it does not so appear, the want cannot be supplied by any statement in the petition for removal or in any subsequent pleadings. This contention is so elementary that it needs no extensive citation of authority to sustain it.

(*Metcalf v. Watertown*, 128 U. S. 586.)

(*State of Minnesota v. Northern Securities Co.*, 194 U. S. 453.)

(*State of Tennessee v. Union & Planters' Bank*, 152 U. S. 453.)

The suggestion on the part of the defendant that he will set up a defense or claim under the laws of the United States does not make the suit one arising under those laws.

(*State of Tenn. v. Union & Planters' Bank, supra.*)

(*Boston & M. Con. Copper S. Min. Co. v. Montana Ore Pur. Co.*, 188 U. S. 632.)

The defendant has lost the distinction between a case that arises under the laws of the United States, and a case that the plaintiff has no right to maintain by reason of some federal law. Were the plaintiff to admit all the allegations in petition for removal, relative to the Act to Regulate Commerce, it would only show that the plaintiff was unable to recover, and not that this case arises under any law of the United States.

(*State of Arkansas v. Kansas & Texas Coal Co.*, 183 U. S. 185.)

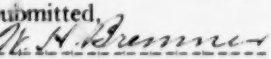
The settled interpretation of the words "arising under the laws of the United States", is that a suit arises under such laws only when the plaintiff's statement of his own claim shows that it is based upon those laws. It is not enough that in the progress of litigation a question under those laws would arise, since that does not show that plaintiff's action derived its life from those laws.

(*Louisville & Nashville Railroad Co. v. Mottley, et al.*, Decided November 16, 1908.)

The question whether or not a shipper is entitled to recover more than the declared value of stock in a contract for inter-state shipment does not present a Federal Question.

(*Pennsylvania R. Co. v. Hughes*, 191 U. S. 477.)

Respectfully Submitted,



GUY A. MILLER,

O. S. FRANKLIN,

Attorneys and Counsel for Plaintiff.

Office Supreme Court, U. S.
FILED.
APR 2 1909
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States,

NO. 12 ORIGINAL, OCTOBER TERM, 1908.

EX PARTE, IN THE MATTER OF FRANK D. WINN, PETITIONER.

The answer of Smith McPherson, Judge of the District Court of the United States for the southern district of Iowa, central division, holding the Circuit Court of the United States for the southern district of Iowa, central division in his own behalf and in behalf of the said Circuit Court to the rule to show cause in the above entitled matter.

IN THE

SUPREME COURT OF THE UNITED STATES.

NO. 12 ORIGINAL. OCTOBER TERM 1908.

EX PARTE. IN THE MATTER OF FRANK D. WINN, PETITIONER.

The answer of Smith McPherson, Judge of the District Court of the United States for the southern district of Iowa, central division, holding the Circuit Court of the United States for the southern district of Iowa, central division, in his own behalf and in behalf of the said Circuit Court, to the rule to show cause in the above entitled matter:

To the Honorable Melville W. Fuller, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The respondent respectfully answers and certifies:

(1) That, as stated in the petition filed in this matter, the petitioner, Frank D. Winn, instituted an action at law in the district court of the state of Iowa for Polk county, against the American Express Company as defendant and filed therein his petition; and that the copy of said petition which is set out in paragraph second of the petition for a writ of mandamus in this matter, is substantially correct, with the following exceptions:

In line 3, page 10, the words "which result from their propensities or natures" are interpolated, and they should be stricken out:

In line 6, page 10, before the word "which" the words "or

which result from their propensities or natures" are omitted, and should be there inserted.

In line 10, page 10, before "employes" insert "or."

In line 12, page 10, after "liable" insert "only."

In line 22, page 10, the word "may" after "option" should be placed after "company."

In line 13, page 11, the word "for" should be "from."

In line 31, page 11, the word "therefor" should be "thereof."

(2) That, as shown by the third paragraph of the petition filed in this matter, a petition for removal was filed within the time required by law in the district court of the state of Iowa in and for Polk county, by the American Express Company, the defendant in the said suit of *Frank D. Winn vs. American Express Company,* and that the copy of the said petition for removal set out in the third paragraph of the petition filed by said Winn in this matter is substantially correct, except minor typographical errors.

That the said petition for removal was so filed in said district court of the state of Iowa, at a time before the said American Express Company, the defendant in said suit, was required by the laws of the state of Iowa, or by the rules of said district court of the state of Iowa to answer or plead to the said petition filed in said court by said Winn; and that the said American Express Company made and filed therewith a bond with good and sufficient surety in all respects in due form, and conditioned as required by the statute in such cases made and provided.

(3) That objections to the removal of the said suit were filed, as stated in paragraph four of the petition herein, and that the said paragraph contains a substantially correct copy of the said objections.

(4) That the district court of the state of Iowa in and for Polk county made the order set out in paragraph five of the petition filed herein.

(5) That the defendant in said case of *Frank D. Winn vs. American Express Company,* caused a certified copy of the record in said cause in the said district court of Iowa in and for Polk county to be entered and filed on the 31st day of October, 1908, in the Circuit Court of the United States for the southern district of Iowa, central division, in due time and in all respects in conformity with law and the said cause was duly docketed in said circuit court and was numbered 3804 law, therein.

(6) That a motion to remand was filed in said cause by the plaintiff therein, as stated in paragraph six of the petition of said Winn in this matter, and that what purports to be a copy of the said motion set out in said paragraph, is a substantially correct copy thereof.

(7) That thereafter, and in the ordinary course, the said motion came on to be heard before the said Circuit Court of the United States for the southern district of Iowa, which was then being held by the respondent sitting as judge of the said court, and upon said hearing counsel for the said Winn was heard orally in support of the said motion and counsel for the said American Express Company was heard orally in resistance thereof and briefs were filed by said counsel in behalf of the respective parties. That it thereupon became and was the duty of the respondent as the judge holding the said Circuit Court, to hear the arguments of counsel for the parties upon the said motion to remand, and to consider and decide the said motion; and that pursuant to said duty the respondent, as judge holding the said Circuit Court, did hear the said arguments and did consider and decide the questions presented by the said motion to remand. The respondent further shows that the said motion to remand was denied by him, as the judge holding the said Circuit Court, in the exercise of the jurisdiction conferred upon him by law, and that his decision upon said motion was in the

exercise of judicial judgment and discretion vested in him by law, and that pursuant to and in accordance with the said decision and determination of the said motion, the order overruling the said motion to remand, which is set out on page 29 of the petition filed in this matter, was entered by the respondent, as the judge holding the said Circuit Court.

The said order as shown by the record, was signed "Smith McPherson, Judge," and was not signed "Smith McPherson, District Judge," as shown at said page 29. That the record shown at said page 29 is the entire record made and entered in said suit in said Circuit Court upon said motion to remand, and that what is set out on pages 27 and 28 of the petition filed by said Winn in this matter, (except only the copy of the motion to remand incorporated therein) is not any part of it a part of any record, or a copy of any record entered or filed in said Circuit Court in said suit of *Frank D. Winn vs. American Express Company.*

(8) That on the 16th day of November, A. D. 1908, Franklin & Miller, the attorneys for the plaintiff in the said suit of *Frank D. Winn vs. American Express Company*, filed in the said suit, in the office of the clerk of the said Circuit Court, their praecipe for appearance, as follows:

In United States Circuit Court, Southern District of Iowa, Central Division.

Frank D. Winn, *Plaintiff,*	No. 3804 Law.
vs. *The American Express Company,* *Defendant.*	PRAECIPE FOR APPEARANCE.

The Clerk of the said Court will please enter our appearance for Frank D. Winn, Plaintiff in above Cause, and Docket the same on the ——— Docket.

FRANKLIN & MILLER.

(9) That thereafter, and on the 4th day of December, A. D.

1908, the parties to said cause filed in the said cause in the office of the clerk of the said Circuit Court, a stipulation, duly signed by the attorneys of record for the respective parties, of which the following is a copy:

In the United States Circuit Court in and for the Southern District of Iowa, Central Division.

Frank D. Winn,
Plaintiff,
vs.
American Express Company,
Defendant.
} STIPULATION.

In the above entitled cause it is stipulated by the parties thereto

1. That the plaintiff shall file a cost bond within fifteen days in the sum of five hundred dollars.

2. That the defendant shall have thirty days after the filing of such cost bond within which to prepare and file its answer to the plaintiff's petition.

Dated Dec. 4, 1908.

FRANKLIN & MILLER,
Attorneys for Plaintiff.
N. T. GUERNSEY,
Attorney for Defendant.

(10) That on the 11th day of December, A. D. 1908, the plaintiff in the said cause filed therein a cost bond in the words and figures following, to-wit:

UNITED STATES OF AMERICA,
DISTRICT OF IOWA,
} ss:

Circuit Court, November Term, A. D. 1908.

Frank D. Winn,
vs.
The American Express Company.
} No. 3804—Law.

We enter our security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this Court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him hereby agree and stipulate that

execution may issue against our property for any costs taxed against him.

Dated this 11th day of December, A. D. 1908.

UNITED SURETY COMPANY,
By Jessie Lee Willeay,
Atty.-in-Fact.

(11) That thereafter, and on or about the 11th day of January, 1909, the defendant filed in the said cause its answer, a copy of which is as follows:

IN THE CIRCUIT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION.

Frank D. Winn,
Plaintiff,
vs.
American Express Company,
Defendant.
} ANSWER.

The defendant for answer to plaintiff's petition respectfully shows to the court as follows, to-wit:

This defendant admits the making of the contract, Exhibit "A" to the plaintiff's petition, and that upon the date of the said contract the hog in question was delivered to the defendant at the state fair grounds in Des Moines, Iowa, for transportation in accordance with the said contract.

This defendant further admits that the hog in question was loaded with other hogs upon a transfer wagon, but denies that it was loaded thereon in the manner stated by the plaintiff.

This defendant admits that the night in question was a very hot one, and that after he was loaded the hog began to suffer with the heat.

This defendant admits that the wagon containing the hog in question was driven by the driver thereof to the office of the defendant, and alleges that this was for the purpose of loading the said animal upon the cars in order to transport it in accordance with the contract referred to.

This defendant further admits that the animal in question died shortly after it reached the railroad station where it was to be loaded on the car.

This defendant denies each and every allegation in the plaintiff's petition not hereinbefore admitted.

Further answering, this defendant respectfully shows to the court that the death of the hog in question was due to excessive heat and to the physical condition and natural propensities of the said animal, and was not due to any negligence or lack of care on the part of this defendant.

This defendant further respectfully shows to the court as follows, to-wit:

That it is provided in the contract, Exhibit "A" to the plaintiff's petition, among other things, as follows:

> The shipper agrees to load, tranship, and unload said animals at his own risk, and during the transportation thereof, to unload and load the said animals whenever the same may be necessary or required, at his own risk, and to furnish the necessary laborers therefor; and further agrees to cause the necessary attendants to accompany and take charge of said animals, the Express Company furnishing free transportation for the attendants who have signed the Attendant's Contract appended hereto, and also furnishing laborers to assist in loading and unloading said animals at the point of shipment and destination, such attendants and laborers not to be regarded, deemed or taken to be the Agents of the Express Company for any purpose whatever, but, on the contrary, such attendants and laborers shall be deemed and taken to be the agents of the shipper.

That one of the owners of the animal in question was present when the said animal was loaded upon the transfer wagon referred to and accompanied the said animal upon the said wagon to the railroad station, and was with it continually from the time it was loaded until its death; and that whatever was done in connection with the transportation of the said animal was done with the concurrence and approval of the owner thereof and without protest or objection from him; and that all precautions suggested by him for its welfare were adopted and followed out.

This defendant further respectfully shows to the court that the tariff of rates applicable to the transportation covered by the contract attached to the plaintiff's petition made no provision for special services whereby the animal in question could be hauled to the cars in a single covered

wagon by itself; and that in the absence of such a provision in said tariff, no agreement could legally be made for said service.

This defendant further respectfully shows to the court that the tariff of rates under which the shipment in question was made, provided a schedule of alternative rates based upon the value of the animal shipped. That the plaintiff's assignors, in order to secure the transportation in question at less than the published tariff rates, wrongfully misrepresented the value of the animal in question and stated the same to be fifty dollars ($50.00), when, as a matter of fact, the value of the said animal at the time, if it was then in good health, was much in excess of the sum of fifty dollars ($50.00), which fact was known to the plaintiff's assignors at the time that the said valuation was given, but was not known to the defendant, whih, at the time, had no knowledge as to the value of the animal in question, except that obtained from the shippers thereof.

That by reason of the premises, the shipment in question was unlawful. That the plaintiff is not entitled to recover, and is estopped from asserting that the value of the animal in question was, at the time of the said shipment, more than the sum of fifty dollars ($50.00).

This defendant further respectfully shows to the court that by the terms of the contract sued on, the recovery of the plaintiff, if he is entitled to recover, is expressly limited to the sum of fifty dollars ($50.00) and denies that the plaintiff could, in any event, recover more than the said amount.

WHEREFORE this defendant prays to be dismissed with its costs.

N. T. GUERNSEY,
Attorney for Defendant.

(12) This respondent respectfully submits that the said order overruling the said motion to remand was in full and complete conformity to law because:

(a) Upon the face of the petition filed in the state court it appeared that the said suit of *Frank D. Winn vs. American Express Company* is a suit of a civil nature, at law, where the matter in dispute exceeds, exclusive of interest and costs, the

sum or value of two thousand dollars ($2,000.00), and arising under the laws of the United States;

(b) That as shown by the petition of said Winn for a writ of mandamus it clearly appears from the averments of various pleadings filed by said Winn in said suit of *Frank D. Winn vs. American Express Company* that the said suit is a controversy between citizens of different states involving more than the jurisdictional amount, in which each party has waived such objections, if any, as he might have otherwise urged against the bringing of said suit in the southern district of Iowa.

(c) That it appears upon the face of the petition filed by said Winn in said suit of *Frank D. Winn vs. American Express Company* that said suit involves controversies arising under the laws of the United States.

(d) That the proper remedy to be invoked by said Winn to question the correctness of the ruling on said motion to remand is an appeal, and not mandamus.

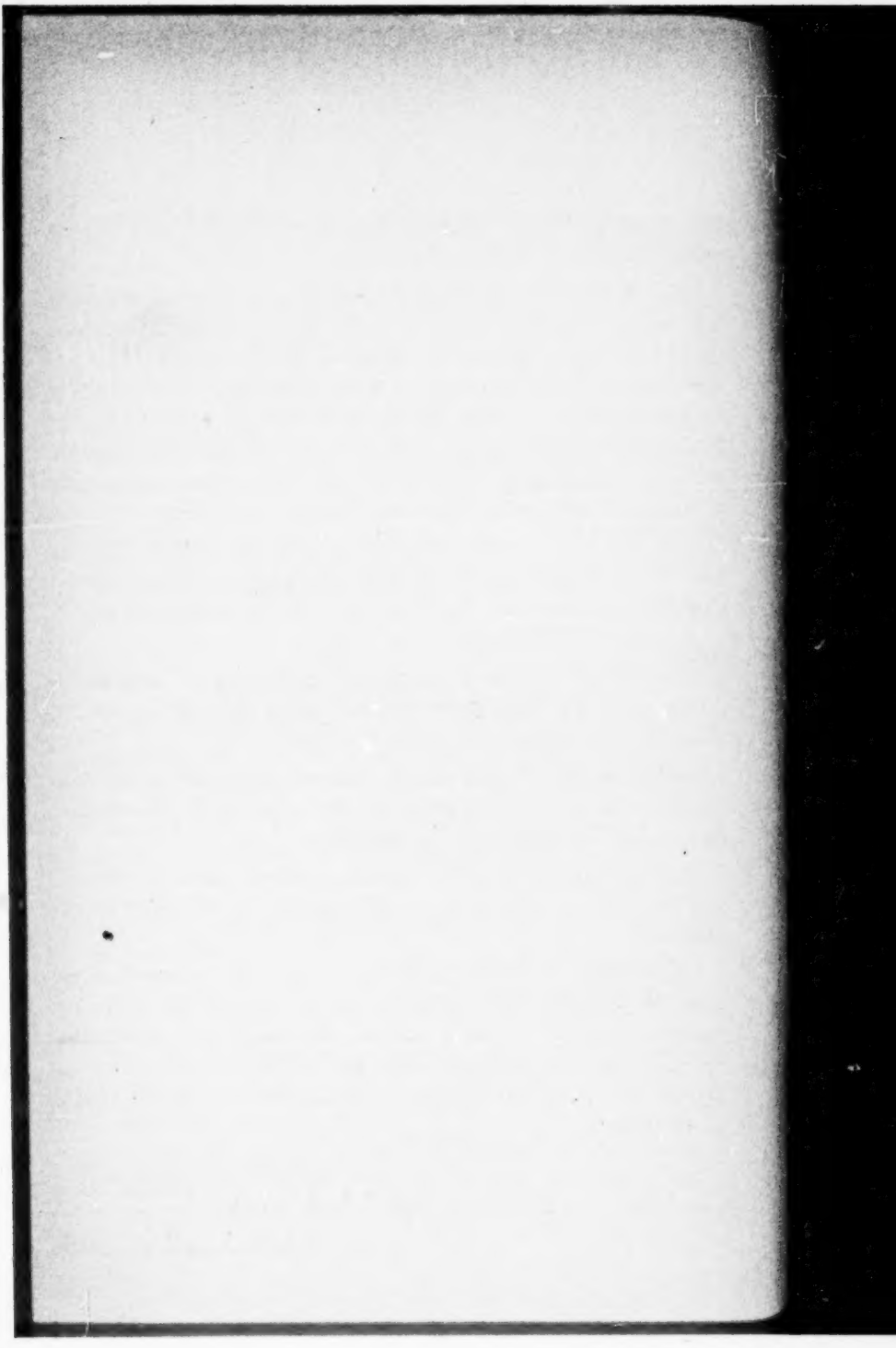
And these are the causes and reasons which this respondent shows why a writ of mandamus should not issue and the prayer of said petition should not be granted.

But he respectfully submits to the judgment of the court, and will enforce by order any direction given by the court in the premises.

IN WITNESS WHEREOF I have hereunto subscribed my name as judge of the district court of the United States for the southern district of Iowa, and, as the judge duly designated therefor and holding said court, for the Circuit Court of the United States for said district, on this thirty-first day of March, A. D. 1909.

SMITH McPHERSON.

United States District Ju
and Circuit Circuit Ju



IN THE

UNITED STATES SUPREME COURT

NO. 12 ORIGINAL. OCTOBER TERM 1908.

EX PARTE, IN THE MATTER OF
FRANK D. WINN,
Petitioner.

BRIEF IN BEHALF OF RESPONDENT.

STATEMENT.

The petitioner, Frank D. Winn, on the 28th day of May, 1908, commenced an action at law against the American Express company in the district court of the state of Iowa, in and for Polk county, claiming $8,000.00 damages, on account of the death of a hog which he had shipped by the defendant company from the state fair grounds at Des Moines, Iowa, to Lincoln, Nebraska. In due time the defendant filed a petition for the removal of this case to the circuit court of the United States for the southern district of Iowa, predicated upon the claim that the case involves a federal question (petition page 14, return page 2). The plaintiff resisted the petition for removal (petition page 18) and it was overruled by the state court (petition page 22). Thereupon the defendant entered a copy of the record in the circuit court (petition page 22, return page 3), and the plaintiff filed a motion to remand (petition page 23). This motion was overruled (petition page 29) and it is to reverse this ruling that this petition for a writ of mandamus is filed.

POINTS.

I.

The jurisdiction of the circuit court is beyond question.

It affirmatively appears from the pleadings filed by the petitioner, Winn, that the parties are citizens of different states and that the amount in controversy exceeds the sum or value of $2,000.00. The contention that the case is ruled by

Ex parte Wisner, 203 U. S. 449,

is unsound, because both parties waived any objection which might have been urged to the maintenance of the suit in the southern district of Iowa. The defendant did this by its petition for removal and otherwise. The plaintiff did it by a general appearance, by a stipulation for a cost bond and for time to plead, and by filing a cost bond in conformity to this stipulation.

Interior Construction Company vs. Gibney, 160 U. S. 217-220.

In re Moore, 209 U. S. 490.

II.

Upon the face of the plaintiff's petition, the case presented questions arising under the laws of the United States.

The character of a case is determined by the questions involved, and if it appears that the claim will be defeated by one construction of a law of the United States or sustained by the opposite construction, it is a case arising under the laws of the United States.

Starin vs. New York, 115 U. S. 248-257.

Tennessee vs. Union & Planters Bank, 152 U. S. 454.

Bankers Casualty Co. vs. Minn., St. P., etc., Ry. Co.,

192 U. S. 371-380.

This doctrine does not conflict with the line of cases holding that a federal question may not be imported into a case by the averments of the answer. Upon the face of the petition filed in the state court, the case necessarily involved the determination of the following questions under the Act to Regulate Commerce:

(a) *Whether the contract limiting the liability of the defendant to $50.00 is valid under the provisions of section 20 of the Act to Regulate Commerce as amended by section 7 of the Hepburn Act.*

This is a question already considered by the Interstate Commerce Commission,

In the matter of Released Rates, 13 Interstate Commerce Commission Reports 550,

but it has not been authoritatively determined by the courts.

Pennsylvania Railroad Co. vs. Hughes, 191 U. S. 477,

was decided prior to the Hepburn Act and is not in point.

(b) *Whether the special contract to haul the hog in a single covered wagon is valid.*

This is a special service. The validity of the contract for this service involves the question whether the Act to Regulate Commerce requires that it shall be covered by a tariff and whether there is in fact a tariff filed in conformity with the Act which does cover it.

Wight vs. United States, 167 U. S. 512.

(c) *Whether the misrepresentation, by the shipper, of the value of the hog, in order to secure a lower rate, was a violation of the Act to Regulate Commerce; and if so, its effect upon the plaintiff's claim.*

The rates in question varied with the value. This false undervaluation resulted in securing to the plaintiff a rate lower than the published rate. The question arises whether this was a violation of section 10 of the Act to Regulate Commerce; and if it was, whether the plaintiff could recover under those circumstances.

III.

Mandamus is not the proper remedy.

The determination of the motion to remand involved an exercise of judicial judgment and discretion, which must be reviewed, if at all, by appeal.

In re Pollitz, 206 U. S. 330.
Ex parte, State of Nebraska, 209 U. S. 436.

ARGUMENT.

I.

The jurisdiction of the circuit court is beyond question.

The petitioner, Winn, alleged in his petition, filed in the state court (petition page 4):

> That the defendant is a corporation organized under and existing by virtue of the laws of the state of New York, and doing business as a common carrier in the county of Polk, state of Iowa.

He also alleged in his resistance to the petition for removal (petition page 18):

> Plaintiff denies that this cause is properly removable to the said court on the ground of diverse citizenship, for the reason that the record herein plainly shows that it is a controversy between a citizen of the state of Missouri, plaintiff, and a citizen of the state of New York, the defendant, and the said cause is not within the original jurisdiction of the said United

> States Circuit Court, and the said circuit court cannot acquire jurisdiction by removal, this plaintiff resisting.

The amount of the plaintiff's claim is $8,000.00. In the motion to remand (petition page 23) the petitioner alleges:

> It appears upon the face of the record herein that the plaintiff is a citizen and resident of the state of Missouri, and the defendant a resident of the state of New York, and the cause is not one within the original jurisdiction of this court; hence this court cannot acquire jurisdiction by removal.

It therefore appears from the averments of the pleadings filed by the petitioner, that the suit is a suit of a civil nature between citizens of different states, where the amount in controversy exceeds exclusive of interest and costs the sum or value of $2,000.00. The jurisdiction of the circuit court is therefore unquestionable.

The contention of the petitioner is obviously that the case is ruled by

Ex parte Wisner, 203 U. S. 449,

but it conclusively appears, from the return to the rule to show cause, that the plaintiff has waived any right which he may have had to assert that this suit is not brought in the right district. In paragraph eight of the return, it appears that the attorneys for Winn entered a general appearance in the circuit court in the said case of *Winn vs. American Express Company* (return page 4), and in paragraph nine of the return, it appears that on December 4, 1908, the parties to the suit entered into a stipulation, by which the plaintiff, Winn, was given time within which to file a cost bond, and the defendant was given thirty days thereafter within which to answer (return page 5). Pursuant to this stipulation, the plaintiff filed his cost bond

on December 11, 1908, and the defendant filed its answer on January 11, 1909 (return, pages 5 and 6).

The petition for removal and stipulation and answer constituted a waiver, so far as the defendant is concerned, and the plaintiff's general appearance, and his stipulation and filing a bond pursuant to the stipulation, constituted a waiver on his part. In

Interior Construction Company vs. Gibney, 160 U. S. 217-220,

it is said:

> Defendants who have appeared generally in the action cannot even object that they were themselves inhabitants of another district, and, of course, cannot object that others of the defendants were such.

In re Moore, 209 U. S. 490,

decides that the objection that the case is not brought in or removed to the particular federal court provided by the statute, is a matter of personal privilege, which the parties may waive. In that case, "a stipulation giving time to the defendant to answer" (page 496) is recognized as such a waiver. This is exactly what was done in the instant case. The cost bond and the answer were filed pursuant to this stipulation. It is therefore clear that the jurisdiction may not be challenged upon the theory that this suit is not pending in the proper district.

II.

Upon the face of the plaintiff's petition, the case presented questions arising under the laws of the United States.

In

Starin vs. New York, 115 U. S. 248-257,

it is said:

> The character of a case is determined by the questions involved. *Osborn vs. Bank of United States*, 9

Wheat. 737, 824. If from the questions it appears that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the act of 1875; otherwise not. Such is the effect of the decisions on this subject. *Cohens vs. Virginia*, 6 Wheat, 264, 379; *Osborn vs. Bank of the United States*, 9 Wheat. 737, 824; *The Mayor vs. Cooper*, 6 Wall. 247, 252; *Gold Washing & Water Co. vs. Keyes*, 96 U. S. 199, 201; *Tennessee vs. Davis*, 100 U. S. 257, 264; *Railroad Co. vs. Mississippi*, 102 U. S. 135, 140; *Ames vs. Kansas*, 111 U. S. 449, 462; *Kansas Pacific vs. Atchison Railroad*, 112 U. S. 414, 416; *Provident Savings Co. vs. Ford*, 114 U. S. 635, 641; *Pacific Railroad Removal Cases*, 115 U. S. 1, 11.

This doctrine has been reaffirmed in many cases, two of which are

Tennessee vs. Union & Planters Bank, 152 U. S. 454.
Bankers Casualty Co. vs. Minn., St. P., etc., Ry. Co., 192 U. S. 371-380.

In

Tennessee vs. Union & Planters Bank, supra,

it is decided that the effect of the Act of March 3, 1887, as corrected by the Act of August 13, 1888, is to limit the jurisdiction, either originally or upon removal, to those cases where it appears by the plaintiff's statement of his claim that a federal question is involved. The cases cited by counsel for the petitioner do not overrule the cases to which we have referred. They simply follow *Tennessee vs. Union & Planters Bank*, in holding that the federal question must appear "by plaintiff's statement of his own claim." All that is decided by *Louisville & Nashville Railroad Company vs. Mottley*, decided November 16, 1908, by this court, is that a federal question may not be imported

into the case by averments in the answer; and this is the settled rule.

Upon the face of the petition filed by Winn in the state court, it affirmatively appears that the decision of that case necessarily involved a construction of the Interstate Commerce Act. The plaintiff's petition necessarily involved, and any court in entering a judgment upon it would necessarily be required to determine, among others, the following questions:

(a) *Whether the contract limiting the liability of the defendant to $50.00 is valid under the provisions of section 20 of the Act to Regulate Commerce, approved February 11, 1887, as amended by section 7 of the Hepburn Act, approved June 29,1906.*

As so amended, section 20 provides, among other things:

> That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contracts, receipt, rule, or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed; Provided, *That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.*

That this is in fact a practical, and not a merely academic question, is shown by the report of the Interstate Commerce Commission in the case entitled

> *In the matter of Released Rates,* 13 Interstate Commerce Commission Reports 550.

This report commences with the following sentence:

Since the passage of the Hepburn Act the Commission has been in receipt of numerous requests for an administrative interpretation of that part of section 20 which deals with the liability of carriers.

After stating certain distinctions, it says:

Bearing these distinctions in mind, we must determine the validity of "Released Rates" of the following character:

I. Rates conditioned upon the shipper's assuming the risk of loss due to causes beyond the carrier's control.

II. Rates conditioned upon the shipper's assuming the entire risk of loss.

III. Rates conditioned upon the shipper's agreeing that the carrier's liability shall be limited to a certain specified value.

The Commission then states its conclusions at page 561, as follows:

I. If a rate is conditioned upon the shipper's assuming the risk of loss due to causes beyond the carrier's control, the condition is valid.

II. If a rate is conditioned upon the shipper's assuming the entire risk of loss, the condition is void as against loss due to the carrier's negligence or other misconduct.

III. If a rate is conditioned upon the shipper's agreeing that the carrier's liability shall not exceed a certain specified value—

a. The stipulation is valid, when loss occurs through causes beyond the carrier's control.

b. The stipulation is valid, even when loss is due to the carrier's negligence, if the shipper has simself declared the value, expressly or by implication, the carrier accepting the same in good faith as the real value, and the rate of freight being fixed in accordance therewith.

c. The stipulation is void as against loss due to the carrier's negligence or other misconduct if the specified amount does not purport to be an agreed valua-

tion, but has been fixed arbitrarily by the carrier without reference to the real value.

d. The stipulation is void as against loss due to the carrier's negligence or other misconduct if the specified amount, while purporting to be an agreed valuation, is in fact purely fictitious and represents an attempt to limit the carrier's liability to an arbitrary amount.

So far as we are advised, it has not been authoritatively determined by any court whether the construction which the Commission has placed upon the Act to Regulate Commerce in connection with contracts, such as the one set out by Winn as a part of his petition, is correct or not, and we submit that it is entirely obvious upon the face of this petition that this case necessarily involves these questions. If defendant had not answered this question would still be presented and would have to be determined before the court could say the plaintiff could in any event recover $8,000.

The case of

Pennsylvania Railroad Company vs. Hughes, 191 U. S. 477,

is not in point, because it was decided some three years prior to the enactment of the Hepburn Act. After an inspection of the Act to Regulate Commerce as it then stood this court said in that case, page 448:

> We look in vain for any regulation of the matter here in controversy.

(b) *Whether the special contract to haul the hog in a single covered wagon is valid.*

This is set out at the top of page 5 of the petition. A fundamental contention of the plaintiff in the case was that the defendant failed in its obligations, in that instead of hauling the animal in a single covered wagon as it had agreed to do it hauled him in a transfer wagon with a

number of other hogs, completely shutting off the circulation of air and thereby reducing the ability of the animal to resist the effects of the excessively high temperature.

There is immediately presented the question whether, under the Act to Regulate Commerce, such a contract is valid in the absence of the averment that there was any tariff on file authorizing such special service, and in the face of the averment that the shipment was made under the contract, Exhibit "A" to plaintiff's petition (petition, page 7), which contains no provision for such special service and provides for no compensation for this service. Whatever the answer alleges, the question whether there must be a tariff filed covering such special service inheres in this allegation of the petition. This court held in

Wight vs. United States, 167 U. S. 512,

that where the rate charged two shippers between Pittsburg and Cincinnati was the same, but free cartage was furnished to one who had no siding, this was an unlawful discrimination and a violation of provisions of the Act to Regulate Commerce. Before the effect of the alleged violation this agreement for special service can be determined there is the fundamental question whether the agreement was valid and lawful, which must be determined by the construction of the Act to Regulate Commerce.

(c) *Whether the misrepresentation by the shipper of the value of the hog in order to secure a lower rate was a violation of the Act to Regulate Commerce; and if so, its effect upon the plaintiff's claim.*

Section 10 of the Act as amended provides, among other things, as follows:

> Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the pro-

> visions of this act, or for whom as consignor or consignee any such carrier shall transport property, who shall knowingly and wilfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, *or by any other device or means,* whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court.

The contract for shipment is preceded by the following notice (Exhibit "A," page 7 petition):

> NOTICE TO SHIPPERS. The shipper will value his stock, which valuation will be inserted in the contract, and the charge for carriage and any liability for damage will be based on such valuation.

Upon page 8 it appears that the rates are "alternative rates, proportioned to the value of said animals." On page 9 is shown the basis for fixing the rate where the value exceeds the minimum. This contract (petition page 9) also provides as follows:

> The shipper, in order to avail himself of said alternative rates and in consideration thereof, being asked by the said Express Company to value the said property, now declares the value hereinafter mentioned to be the *true values* of said animals so to be shipped, as follows, to-wit: (Number and kind). One hog crated. Value each $50.00.

The legal rate under this contract varies with the value and this false undervaluation enabled the plaintiff to se-

cure the benefit of a rate which was less than the legal rate. It constituted a violation of the portion of the law which has just been quoted; or in any event there inheres in this case the question whether it did so violate that law. If it did the question at once arises whether under those circumstances the plaintiff could recover anything or, in any event, more than $50.00 named in the contract.

These questions all appear upon the face of the plaintiff's claim as stated by him. If no answer were filed, it would be impossible for the court to allow the plaintiff's claim for this $8,000.00 without deciding these questions under the Act to Regulate Commerce. By one construction of this act, the contract limiting the defendant's liability may be sustained; by another construction, it may be overthrown. By one construction of this act, the special contract to haul the animal in a single wagon may be upheld; by another, it must be disregarded. By one construction of the act, the plaintiff, in inducing this contract by his misrepresentation of the value of the animal, violated the act; by another, he did not. These questions are involved in this case and they determine its character.

III.

Mandamus is not the proper remedy.

In paragraph seven of the return, page 3, it appears that the motion to remand came on to be heard in the regular manner and was argued, both orally and upon briefs, by counsel for both parties, imposing upon the court the duty of considering and deciding this motion; and that the court considered and decided the questions presented by the motion. This involved an exercise of the judicial judgment and discretion vested in the court by law, and the remedy, if the petitioner desires to review this judgment,

is by writ of error and not by mandamus. The case comes squarely within the rule of

In re Pollitz, 206 U. S. 330.

Ex parte, State of Nebraska, 209 U. S. 436.

In the *Pollitz* case, the question was whether a separable controversy was involved so as to render the cause removable. Here, the issue on the motion to remand was whether there was a federal question involved so as to render the cause removable. In the *Pollitz* case, at page 331, the court says:

> The issue on the motion to remand was whether such determination could be had without the presence of defendants other than the Wabash Railroad Company, and this was judicially determined by the circuit court, to which the decision was by law committed.
>
> The application to this court is for the issue of the writ of mandamus directing the circuit court to reverse its decision, although in its nature a judicial act and within the scope of its jurisdiction and discretion.
>
> But mandamus cannot be issued to compel the court below to decide a matter before it in a particular way or to review its judicial action had in the exercise of legitimate jurisdiction, nor can the writ be used to perform the office of an appeal or writ of error.

The only difference between that case and this is that here, the issue on the motion to remand was whether the case involved a federal question instead of whether it involved a separable controversy.

In

Ex parte Nebraska,

the court says at page 440:

> The motion to remand presented for decision the question whether there was in the case a controversy wholly between citizens of different states, to the

complete determination of which the state of Nebraska was not an indispensable party. If defendant's contention was correct, the action could have been originally brought in the federal court and its jurisdiction of the case was complete on removal. The circuit court was called upon to determine that question and to exercise judicial discretion in deciding it. This being so, its jurisdiction was complete, and if it erred in its conclusions the remedy is not by writ of mandamus, which cannot be used to perform the office of an appeal or writ of error. The applicable principles have been laid down in innumerable cases. *Ex parte Bradley,* 7 Wall. 364; *Ex parte Loring,* 94 U. S. 418; *In re Rice,* 155 U. S. 396; *In re Atlantic City Railroad,* 164 U. S. 633.

The court says further on page 446:

> The circuit court was called upon on this record to decide whether the state of Nebraska had any real or legal interest in the controversy alleged to have been wholly between citizens of different states; and it was a decision which the court had a right to make, involving no abuse of judicial discretion. A premature review cannot be obtained by a writ of mandamus.

The decision which the court was required to make by the record in the case at bar, was a decision which it had a right to make and which involved no abuse of judicial discretion. Mandamus is not the proper remedy.

Respectfully submitted,

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